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Please find below and/or attached an Office communication concerning this application or proceeding.

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Paper No. 30

Application Number: 09/460222

Filing Date: 12/13/1999

Appellant(s): Miyagawa et al

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Technology Center 290

James Ledbetter

For Appellant

SUPPLEMENTAL EXAMINER'S ANSWER

This is in response to the appeal brief filed Jan. 15, 2003
and the remand by the Board of Appeals dated Jan 06, 2004.

(1) Real Party in Interest

A statement identifying the real party in interest is contained in the brief.

(2) Related Appeals and Interferences

A statement identifying the related appeals and interferences, which will directly affect or be directly affected by or have a bearing on the decision in the pending appeal is contained in the brief.

(3) Status of Claims

The statement of the status of the claims contained in the brief is correct.

(4) Status of Amendments After Final

No amendment after final has been filed.

(5) Summary of Invention

The summary of invention contained in the brief is correct.

(6) Issues

The appellant's statement of the issues in the brief is correct.

(7) Grouping of Claims

Appellant's brief includes a statement that claims 26, 28-32, and 34-38 do not stand or fall together and provides reasons as set forth in 37 CFR 1.192(c)(7) and (c)(8).

(8) ClaimsAppealed

The copy of the appealed claims contained in the Appendix to the brief is correct.

(9) Prior Art of Record

No prior art is relied upon by the examiner in the rejection of the claims under appeal.

(10) Grounds of Rejection

The following ground(s) of rejection are applicable to the appealed claims:

Claims 26, 28-32 and 34-38 are rejected under 35 U.S.C. 251. This rejection is set forth in prior Office Action, Paper No. 18.

(11) Response to Argument

Appellant's arguments have been carefully studied including and not limiting to the arguments drawn to In re Clement and In re Hester. However it is noted that the fact situation of this case is similar to the fact situation of the Pannu case. Furthermore, the Pannu case considered the above cases. Thus the purpose of Appeal, the examiner would directly response the arguments related to the Pannu case.

The following remarks are written in conjunction with **Pannu v. Storz Instruments, Inc.** 258 F.3d 1366, 59 USPQ. 2d 1597 (Fed. Cir. 2001) format.

Background:

On August 05, 1991, Applicants filed a patent application for an optical disk apparatus, S/N 740,629 ('629 application). The '629 application discloses an optical disk recording, reproducing or erasing information signals onto/from a plurality of optical disks in which thickness of disk substrates are different. To

accomplish the invention objective, the apparatus comprises the use of N converging means who's aberrations

have been corrected for N ($N > 2$) disk substrates having different thickness. The apparatus also discloses the use of disk discriminating means for generating the disk thickness discriminating signal and a control means for selecting one of the converging means in which the occurrence of the aberration due to the disk substrate is smallest based on the discriminating signal.

Independent claim 1 of the '629 application reads as follows:

An optical disk apparatus for recording, reproducing, or erasing an information signal by converging a light flux onto/from a recording layer through a transparent disk substrate, comprising:

N converging means whose aberrations have respectively been corrected for said N ($N > 2$) disk substrates having different thickness;

disk discriminating means for discriminating the thickness of the disk substrate of a loaded optical disc and for generating a discriminating signal corresponding to the result of the discrimination; and control means for selecting the converging means in which the occurrence of the aberration due to the disc substrate is smallest in accordance with the discriminating signal.

The examiner rejected claims 1 and 6 as being anticipated under 35 U. S. C. 102 (e) in view of Nishiuchi et al (U. S Patent No. 5,097,464). The prior art reference shows each of the elements claimed in claim 1. Claims 1-30 were also rejected under 35 U. S. C 112, second paragraph, and the office action indicates that claims 2-5, and 7-30 were objected to and contain allowable subject matter if rewritten in an independent form including all of the limitations of the base claim

and any intervening claims. In response applicants filed an amendment canceling claims 1, 6, 11, 16, 21 and 26 and rewriting claims 2, 4, 5, 7, 8 and 9 in independent form and also amended these claims to overcome the 112, second paragraph, rejection.

During the prosecution of the U. S Patent No. 5,235,581, applicant stated in the remarks that claims 1 and 6 are rejected under 35 U. S. C. 102 as being anticipated by the prior art. Applicant's remarks did not rebut the examiner's rejection and thus fully agree with the examiner's position. Therefore, in order for applicant to overcome the "prior art" rejection, an amendment canceling the rejected claims (claims 1 and 6) and amending claims 2, 4, 5, and 7-9 in independent form was filed. In addition, applicant argued what appears to be the patentable subject matter that is defined over the prior art in claim 4; stating "control means selects one of the plurality of the light emitting means which are associated with the converging optical systems. By selecting one of the light emitting means, an aberration caused by the difference of the disk substrate thickness is minimized". Regarding claim 6 and 7, applicant raise the issue that "control means is defined as generating a control signal which is provided to the selecting means in accordance with the discrimination signal".

The examiner accepted applicant's arguments. In response, the examiner issued a notice of allowance and claims 2-5, 7-10, 12-15, 17-20, 22-25 and 27-30 issued as U. S Patent No. 5,235,581 ('581 patent).

Independent claim 2 issues as claim 1 of (U. S Patent No. 5,235,581) reads**as follows:**

An optical recording/reproducing apparatus for recording, reproducing, or erasing an information signal by converging a light flux onto/from a recording layer through a transparent disk substrate, comprising:

- (a) N optical heads, N being greater than or equal to 2, each comprising:
 - light emitting means,
 - objective lenses, whose aberrations have respectively been corrected for said N disc substrates having different thickness, each for converging the light flux which is emitted from the light emitting means onto the optical disc, and
 - a plurality of photo detecting means each for detecting the reflected light from the optical disk
- (b) N optical head moving means which are arranged below the optical disk and move N optical heads in the radial direction of the optical disc;
- (c) disc discriminating means for discriminating the thickness of the disc substrate of the loaded optical disc and for generating a discriminating signal in accordance with the result of the discrimination; and
- (d) control means for selecting the optical head having the objective lens in which the occurrence of the aberration due to the disc substrate is smallest in accordance with the discrimination signal,
wherein the selected optical head records, reproduces or erases the information signal onto/from the optical disc.

Independent claim 4 issued as claim 7 of (U. S Patent No. 5,235,581) reads as follows:

An optical recording/reproducing apparatus for recording, reproducing, or erasing an information signal by converging a light flux onto/from a recording layer through a transparent disc substrate, comprising:

(a) an optical head having N, N being greater than or equal to 2, converging optical systems each comprising:

light emitting means,

objective lenses, whose aberration have respectively been corrected for said N disc substrates having different thickness, each for converging the light flux which is emitted from the light emitting means onto the optical disc, and

a plurality of photo detecting means each for detecting the reflected light from the optical disc;

(b) optical head moving means which is arranged below the optical disc and moves the optical head in the radial direction of the optical disc;

(c) disc discriminating means for discriminating the thickness of the disc substrate of the loaded optical disc and for generating a discriminating signal in accordance with the result of the discrimination; and

(d) control means for allowing the light emitting means, which belongs to the converging optical system in which the occurrence of the aberration due to the disc substrate is smallest in accordance with the discrimination signal, to emit light,

wherein the selected converging optical system records, reproduces or erases the information signal onto/from the optical disc.

Independent claim 5 issued as claim 10 of (U. S Patent No. 5,235,581) reads as follows:

An optical disk recording/reproducing apparatus for recording, reproducing, or erasing an information signal by converging a light flux onto/from a recording layer through a transparent disc substrate, comprising:

(a) an optical head including:

light emitting means,

light flux dividing means which are arranged in the light flux from the emitting means and divide the emitted light flux into N, N being greater than or equal to 2, light fluxes and deflect in different directions,

N objective lenses, whose aberrations have respectively been corrected for said N disc substrates having different thickness, for respectively converging said N light fluxes onto the optical disc,

light flux selecting means for selecting one of the N light fluxes divided by the light flux dividing means and for allowing said light flux to pass, and

photo detecting means for detecting the light fluxes reflected from the optical disc;

(b) optical head moving means which is arranged below the optical disc and moves the optical head in the radial direction of the optical disc;

(c) disk discriminating means for discriminating the thickness of the disc substrate of the loaded optical disc and for generating a discriminating signal in accordance with the result of the discrimination; and

(d) control means for generating a control signal to the light flux selecting means in accordance with the discrimination signal and for selecting the light flux which passes through the objective lens in which the occurrence of the aberration due to the disc substrate is smallest,

wherein the optical head records, reproduces or erases the information signal onto/from the optical disk by the selected light flux.

Independent claim 7 issued as claim 13 of (U. S Patent No. 5,235,581) reads as follows:

An optical recording/reproducing apparatus for recording, reproducing, or erasing an information signal by converging a light flux onto/from a recording layer through a transparent disc substrate, comprising:

(a) an optical head including:

an optical waveguide formed on a substrate,

N light emitting means each for emitting a waveguide light into said optical waveguide, N being greater than or equal to 2,

N converging grating couplers, whose aberrations have respectively been corrected for said N disc substrates having different thickness, each for emitting the waveguide light supplied from said N light emitting means to the outside of the optical waveguide and for allowing the reflected light from the optical disc to enter, and

N photo detecting means each for detecting reflected light and for generating an information signal;

(b) optical head moving means which is arranged below the optical disc and moves the optical head in the radial direction of the optical disk;

(c) selecting means for selecting the light emitting means to be allowed to emit the light from among the N emitting means;

(d) disc discriminating means for discriminating the thickness of the disc substrate of the loaded optical disc and for generating a discriminating signal according to the result of the discrimination; and

(e) control means for generating a control signal in accordance with the discrimination signal, for providing said control signal to said selecting means and for allowing the light emitting means for emitting the waveguide light into the converging grating coupler in which the occurrence of the aberration due to the disk substrate is smallest,

wherein the optical head records, reproduces or erases the information signal onto/from the optical disc by the light flux from the selected light emitting means.

Independent claim 8 issued as claim 16 of (U. S Patent No. 5,235,581) reads as follows:

An optical recording/reproducing apparatus for recording, reproducing, or erasing an information signal by converging a light flux onto/from a recording layer through a transparent disc substrate, comprising:

(a) an optical head including:

an optical waveguide formed on a substrate,

light emitting means for emitting a waveguide light into said optical waveguide,

light flux dividing means for dividing the waveguide light emitted from the light emitting means into N divided waveguide lights, N being greater than or equal to 2,

said N converging grating couplers, whose aberrations have respectively been corrected for said N disk substrates having different thickness, each for emitting each of said N divided waveguide lights to the outside of the optical waveguide and for allowing the reflected light from the disk to enter, and

N photo detecting means for respectively detecting said reflected light from the N converging grating couplers and for generating information signals;

(b) optical head moving means which is arranged below the optical disk and moves the optical head in the radial direction of the optical disc;

(c) output switching means for selecting and outputting one of the output signals of said N photo detecting means;

(d) disc discriminating means for discriminating the thickness of the disc substrate of the loaded optical disc and for generating a discriminating signal in accordance with the result of the discrimination; and

(e) control means for generating a control signal to the output switching means in accordance with the discrimination signal and for selecting the photo detecting means into which the waveguide light enters from the converging grating coupler in which the occurrence of the aberration due to the disk substrate is smallest.

Independent claim 9 issued as claim 19 of (U. S Patent No. 5,235,581) reads as follows:

An optical recording/reproducing apparatus for recording, reproducing, or erasing an information signal by converging a light flux onto/from a recording layer through a transparent disk substrate, comprising:

(a) an optical head including:

an optical waveguide formed on a substrate,

light emitting means for emitting a waveguide light into said optical waveguide, optical path switching means which is arranged on an optical path of said waveguide light and switches the propagating direction of the waveguide light in N directions in accordance with a control signal, N being greater than or equal to 2,

N converging grating couplers, whose aberrations have respectively been corrected for said N disk substrates having different thickness, and which are respectively arranged in said N propagating directions which are switched by said optical path switching means and emit the waveguide light to the outside of the optical waveguide and allow the reflected light from the optical disk to enter, and

photo detecting means for detecting reflected light and generating an information signal;

(b) optical head moving means which is arranged below the optical disk and moves the optical head in the radial direction of the optical disc;

(c) disc discriminating means for discriminating the thickness of the disc substrate of the loaded optical disc and for generating a discriminating signal in accordance with the result of the discrimination; and

(d) control means for generating a control signal to the optical path switching means in accordance with the discrimination signal and for switching the propagating direction of the waveguide light from the light emitting means to the direction of the converging grating coupler in which the occurrence of the aberration due to the disc substrate is smallest,

wherein the optical head records, reproduces or erases the information signal onto/from the optical disc by the light flux emitted from the selected converging grating coupler.

On December 13, 1999 appellant filed a reissue application of the '581 patent.

The reissue claims 26, 28-32 and 34-38 have deleted subject matter that

applicants previously surrendered during the prosecution of the '581 patent. Thus these claims were rejected under the recapturing rule as stated below:

Claims 26, 28-32, and 34-38 are rejected under 35 U.S.C. 251 as being an improper recapture of broadened claimed subject matter surrendered in the application for the patent upon which the present reissue is based. See *Hester Industries, Inc. v. Stein, Inc.*, 142 F.3d 1472, 46 USPQ2d 1641 (Fed. Cir. 1998); *In re Clement*, 131 F.3d 1448, 45 USPQ2d 1164 (Fed. Cir. 1997); *Ball Corp. v. United States*, 729 F.2d 1429, 1436, 221 USPQ 289, 295 (Fed. Cir. 1984). A broadening aspect is present in the reissue, which was not present in the application for patent. The record of the application for the patent shows that the broadening aspect (in the reissue) relates to subject matter that applicant previously surrendered during the prosecution of the application. Accordingly, the narrow scope of the claims in the patent was not an error within the meaning of 35 U.S.C. 251, and the broader scope surrendered in the application for the patent cannot be recaptured by the filing of the present reissue application.

The recapture rule "prevents a patentee from regaining through reissues the subject matter that he surrendered in an effort to obtain allowance of the original claims". *In re Clement*, 131 F.3d 1448, 45 USPQ2d 1164 (Fed. Cir. 1997). Reissued claims that are broader than the original patent's claims in manner directly pertinent to the subject matter surrendered during prosecution are impermissible.(Mentor, 998 F. 2d at 996, 27 USPQ2d at 1525).

During the '581 patent prosecution, the rejected claims 1 and 6 (in addition to claims 11, 16, 21 and 26) were canceled and claims 2, 4, 5, and 7-9 were amended (see paper# 6 filed Nov. 17, 1992) to include the allowable subject

matter of the original claims. Limitations were specifically added to overcome the prior art rejection. The newly added limitations included for example, "N optical heads, N being greater than or equal to 2"; objective lenses "whose aberrations have respectively been corrected for said N disc substrates having different thickness"; "a plurality of" photo detecting means, control means for "allowing" and control means "for providing said control signal to said selecting means and for allowing the light emitting means for" which have now been removed from the present reissue application. This constitutes an improper recapture of the claims, see Pannu v. Storz Instruments, Inc. 258 F.3d 1366, 59 USPQ. 2d 1597 (Fed. Cir. 2001).

The broaden aspect of the reissued claims is directly related to the surrendered subject matter. The reissue claims 26, 28, and 34 now recite "converging means for converging said light flux on said second layer of said one of said N optical discs " (claim 26 lines 12-14, claim 28 lines 13-14, and claim 34 lines 13-14) and not the use of the surrendered subject matter "N converging means (objective lenses) whose aberrations have respectively been corrected for said N ($N > 2$) disc substrates having different thickness".

The reissue claims 26, 28 and 34 are now broader since claims 26, 28 and 34 do not recite the limitations "disc discriminating means for discriminating the thickness of the disk substrate of a loaded optical disk and for generating a discrimination signal" nor recite the limitation "control means for selecting the optical head having the objective lens in which the occurrence of the aberration due to the disk substrate is smallest in accordance with the discrimination signal" as amended during the prosecution of the '581 patent application to overcome the prior art rejection.

The reissue claims recite the use of "light emitting means" as opposed to the use of "N light emitting means wherein the control means selects one of the plurality of light emitting means which are associated with the converging optical systems" as amended by applicant to overcome the prior art rejection.. Thus reissue claims are indeed broader than the subject matter surrendered during the prosecution of the '581 patent.

In response to the remand from the Board of Patent Appeal and Interference (BPAI) dated Jan 06, 2004 in view of its precedential opinion, Ex Parte Eggert et al, Appeal No. 2001-0790 (bd. Pat. & Inter. May 29, 2003). The following action is taken:

Background

Applicant filed a reissue application with claims 26, 28-32 and 34-38. In the reissue application, the new claims 26, 28-32 and 34-38 attempt to recapture subject matter surrendered in the original application. The appeal before the Board of Patent

Appeals and Interference (BPAI) appeals the decision of the Examiner to reject claims 26, 28-37 under 35 USC 251 as recapture. No other issues are present in the appeal.

Reissue application 09/460,222 of the patent to Miyagawa 5,235,581 (application 07/740,629), has three independent claims, namely 26, 28, and 34. The following analysis looks into whether the reissue claims are impermissibly broadened, by removing limitations that were relied upon during prosecution to define over the applied prior art.

Broadly speaking, the patent discloses a system of writing data on optical discs using a laser system having multiple optical head writers. Because different discs can have optical layers of varying thickness, it is essential for the system to be

able to recognize the thickness of the optical layer of the disc in use, and to select the optimal optical head writer for the disc at hand. Because the system was specifically designed with multiple optical heads for selective writing on

different kind of discs having varying optical layers, the number of the optical heads N must be equal to or greater than 2. Consequently, the sum of the similar optical components N of the system is identical with the number of the optical heads.

In the prosecution of the original application (07/740,629), the Examiner rejected independent claim 1 and as being anticipated by Nishiuchi 5097464, that disclosed an invention similar to the claimed invention, albeit with only one head. The main difference between the claimed invention and the prior art is that instead of having multiple optical heads, the prior art had a transparent plate (element 9) for corrections of the optical path length through the optical layers of different discs. The rejection listed all the limitations in the independent claim 1, and read them on elements in the Nishiuchi patent. In the reply, Applicants canceled claim 1, and re-wrote dependent claims 2, 4, 5, 7, 8, 9 in independent form to incorporate the limitations of claim 1. Claim 6 and its dependent claims 16 and 26 were canceled. Arguments were made regarding (the cited claims numbers refer to patent claims numbers NOT the original application claims numbers): a) the control means selecting one of a plurality of light emitting systems for the minimization of the substrate-thickness aberration (claim 7); b) the control means generating a signal to the selecting means according to the discrimination signal (claims 10, 13 (it is believed that the reference in the response to application claims 6 and 7 is an error for application claim 5 (patent claim 10) and application claim 7 (patent claim 13)); and c) the definition of N converging grating couplers (claim 19). Although the response argued that the amendment was made to overcome a blank rejection of all the claims under 35 USC 112, it rather addresses the limitations that that in combination with the other limitations of the independent claims defined the claims over the applied

prior art. It is also to be noted that the Examiner identified the allowable claims because they defined over the prior art, and Applicants did not refute the Examiner's conclusion.

In the rejection of the claims made in the reissue application, the Examiner properly rejected the reissue claims by noting that the Applicant is attempting to remove said limitations, that were added in-combination to define over the applied prior art to provide the allowed claims, and as explained above, Applicant's current argument that the amendment was intended to overcome the rejection under 35 USC 112, 2nd paragraph is not credible.

In the present instance, Applicant argued the novelty of the following limitations:

Element X: control means selecting objective lens minimizing the aberration caused by the disc substrate.

Element Y: means for discriminating the thickness substrate (see page 9 of paper no. 6, filed 11/17/1992).

Element Z: the number of the optical heads, N1 equal or greater than 2, and the identical number N of their respective similar components. This limitation is critical in defining over the prior art, and although specifically argued by Applicant (in the original application) only with regard to application claim 9 and patent claim 19, it is inherently implied in Applicant's response through the use of plural language for limitations such as "plurality of light emitting means", and "converging optical systems", i.e., the optical heads (see loc. cit.).

To overcome the prior art rejection, Applicant rewrote the claims, which were ultimately allowed to add in combination limitations X, Y, and Z, to the other limitations of the claims, i.e., limitations X, Y, and Z were made part of all the claims.

The applicant made the choice of inserting, i.e., incorporating, limitations X, Y, and Z into all the claims allowed. The applicant chose not to prosecute further

variations of the claims omitting limitations X, Y, and Z; rather the combination of all these limitations are present in the originally allowed claims. At the present, on reissue, applicant is not permitted to completely delete limitations X, Y and Z. See *Pannu v. Storz Instruments, Inc.*, 258 F.3d 1366, 59 USPQ2d 1597 (Fed. Cir. 2001), discussed below.

Eggert: The decision in *Ex Parte Eggert*, Appeal No. 2001-0790 (Bd. Pat. App. & Inter., decided May 29, 2003) (precedential opinion of an expanded panel

of the Board) is **not applicable** to the facts of this appeal. The claims on appeal omit the surrender generating limitations (i.e., the limitation(s) added to all claims in the original prosecution to define over the art to secure allowance of the patent). This is because the limitations of **patent** claim 1 (that were added in the original application), which are represented as element X, Y, and Z above, respectively, in their entirety, are essentially absent from the reissue claims 26, 28, 34. Therefore, the claims impermissibly recapture what was previously surrendered.

In view of *In re Clement*, 131 F.3d 1464, 45 USPQ2d 1161 (Fed. Cir. 1997), if a reissue claim is broader in an aspect germane to what was surrendered in response to a prior art rejection, but narrower in another aspect completely unrelated to what was surrendered, the recapture rule bars the claim. This is the

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understanding of how the shorthand set forth in *Clement*, 131 F.3d at 1470, 45 USPQ2d at 1165 for the broadening/narrowing scenario 3(a), is applied in light of *Hester Industries, Inc. v. Stein, Inc.*, 142 F.3d 1472, 46 USPQ2d 1641 (Fed. Cir.

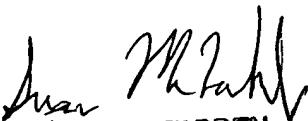
1998) and *Pannu v. Storz Instruments, Inc.*, 258 F.3d 1366, 59 USPQ2d 1597 (Fed. Cir. 2001) both of which pointed out that one should look at the limitation relied upon to define the invention over the prior art, and determine if that limitation is omitted in the reissue claims. Note also the statement in *Clement* that every time the claims are narrowed by amendment, subject matter is surrendered. *Clement*, 131 F.3d at 1471, 45 USPQ2d at 1166 ("every time Clement amended his claims, he intentionally omitted or abandoned the claimed subject matter."). The combination of the limitations of elements X, Y and Z in claims 1, 7, 10, 13, 16, and 19 of the original patent are germane to what was surrendered in response to a prior art rejection. Therefore, the limitations of elements X, Y and Z of claims 1, 7, 10, 13, 16, and 19 were necessary in order to secure a patent.

¹ Note that the use of N in the instant application is somewhat misleading. In the original patent, N limited the number of different types of discs having different optical layers AND the number of optical heads. In the instant application N limits only the number of types of discs.

Similar to the facts in *Pannu v. Storz Instruments, Inc.*, 258 F.3d 1366, 59 USPQ2d 1597 (Fed. Cir. 2001), the applicant has broadened the reissue claims in an aspect germane to what was surrendered in response to the prior art rejection, and has narrowed in an area not related to the surrender. The decision in *Pannu* is on point as to the issues on appeal, because it provides an actual fact situation in which this scenario was held to be recapture. Thus, *Pannu* is on

point while *Eggert* is not, and claims 26, 28, and 34 impermissibly recapture what was previously surrendered.

For the above reasons, it is believed that the rejections should be sustained.



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October 20, 2004

Conferees